27 November 2020

Manager
JobKeeper Division – Fiscal Group
The Treasury
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By email: JobMakerHiringCredit@treasury.gov.au

CC: Ms Maryanne Mrakovcic: maryanne.mrakovcic@treasury.gov.au

Dear Sir/Madam,

JobMaker Hiring Credit Exposure Draft Rules

The National Tax Liaison Group (**NTLG**) is the Australian Taxation Office's (**ATO**) longest standing consultative forum, focusing on strategic taxation matters of national interest. The primary objective of the NTLG is to provide a wide range of stakeholders with the opportunity to discuss the strategic direction of the tax system and to deliver opportunities for improvements to the administration of the tax system. The NTLG's membership is comprised of senior ATO and Treasury officers and representatives of the major tax, law, and accounting professional associations. Details of the activities of the NTLG, including its membership, can be found here.

Chartered Accountants Australia and New Zealand, Corporate Tax Association, CPA Australia, Institute of Public Accountants, Law Council of Australia and The Tax Institute are the external members of the NTLG. These organisations, with the exception of the Corporate Tax Association and the Law Council of Australia, (hereafter referred to as the **Joint Bodies**) write to you as the peak professional accounting and tax practitioner bodies in Australia representing the tax profession at this critical time.

Discussion

The Joint Bodies welcome the JobMaker Hiring Credit (**JobMaker**) measure. We have reviewed the *Exposure Draft Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 9) 2020* (**Exposure Draft Rules**) and the Exposure Draft Explanatory Material (**Explanatory Material**) published by Treasury on 30 October 2020. Ahead of the Exposure Draft being finalised and registered, the Joint Bodies would like to raise a number of issues for Treasury's consideration.

1. Complexity and uncertainty.

The Joint Bodies consider that there is a high degree of uncertainty for employers, not only in relation to whether they may be entitled to JobMaker, but also to as to the extent to which they are so entitled. This uncertainty stems from the complexities of the various calculations that must be undertaken. This will also be problematic for advisers responding to clients who wish to make hiring decisions on the basis that they will receive a hiring credit.

The headcount increase requirement

The Exposure Draft Rules require an employer to have a headcount increase for a JobMaker period in order to receive any hiring credit. The amount of any headcount increase will also act to limit the credit available due to the 'maximum payable days' being calculated based on the headcount increase amount for the period under subsection 32(5). This can result in a reduction of the 'headcount amount' in accordance with subsection 32(2).

At the outset, the Joint Bodies consider the calculations to be unnecessarily complex. Complex calculations are required for the purposes of both subsection 29(4) and subsection 32(5). These complexities will make it difficult for any business to know the extent to which they will be entitled to a credit in any period. For the reasons outlined below, arbitrary events (and the timing of such events) can have a significant impact on whether an entity is eligible for a hiring credit for a JobMaker period.

Uncertainty as to the receipt of the hiring credit

Business are more likely to engage in a system or program where there is certainty as to its application. The Joint Bodies are concerned that a business may [do all the right things and] hire new staff members based on an expectation that the cost will be subsidised by the JobMaker program. However, due to the complexity of the calculations, employers will not have certainty that that will be the case and will not know the quantum of any hiring credit that they may otherwise receive.

Anomaly where staff members resign, retire or die on the last day of a JobMaker period

The 'headcount increase' under subsection 29(1) is determined by comparing the number of employees employed by the entity at the end of the last day of a JobMaker period to the 'baseline headcount' for the period. This can give rise to unfair outcomes where an employer hires 'eligible additional employees' (as defined) and increases their total payroll in a JobMaker period but has other employees leave before the last day of the period for reasons outside of the employer's control. An employee resigning on, say, 6 January 2021 rather than 7 January 2021 should not affect the employer's entitlement to JobMaker for the whole of the first JobMaker period.

The 'headcount increase' requirement is an important integrity measure to ensure employers do not have an incentive to terminate staff and hire replacement staff to obtain JobMaker. However, there will be natural attrition in most workforces with staff members voluntarily resigning (e.g. due to retirement, family or care commitments, or simply to take up employment elsewhere). Voluntary resignations and retirements are typically outside of the control of the employer, and so this significantly undermines any certainty an employer has when forecasting whether they will be eligible for JobMaker that may then be available in the 12 months following the hiring of an additional employee.

Inadvertent impact on the headcount amount

Likewise, and more importantly, where staff members leave during a JobMaker period (and these departures are outside of the control of the employer), the maximum payable days under subsection 32(5) will be limited. Accordingly, if an employer hires two eligible additional staff members for the whole of the period, but one other (unrelated) staff member retires or dies on the last day of the period, the employer is obliged to reduce the headcount amount for that one person. The credit amount would be reduced, and available only for one person. In our view, this outcome is not in line with the policy intent of the provisions.

Alternative options

We consider that the issues raised above could be addressed by adopting an alternative model for the headcount requirement. We have outlined below two alternative models. Option 1 is very simple and could deal generally with the problems identified in a non-complex manner. Option 2 may provide a more precise answer although it involves more complexity and for this reason is not our preferred option. We include Option 2 for completeness only.

Option 1 — adjustment model

One solution to issues raised would be to allow an entity to have a headcount increase amount where they hire an additional employee, even in cases where another employee voluntarily resigns or dies before the end of the relevant JobMaker period.

A simple way to achieve this would be to adjust the 'baseline headcount' such that it is reduced by the number of employees who voluntarily resign or retire in the JobMaker period (the **reduction adjustment**). The reduction to the baseline headcount should only be available in respect of employees who were employed as at 30 September 2020 and were included in the original baseline headcount calculation. This would prevent an inappropriate reduction where an employee is hired and leaves in the JobMaker periods.

The Joint Bodies consider that the 'payroll increase' condition will act as an additional limit on the amount of any JobMaker Hiring Credit in situations where new employees are hired but existing employees leave. This 'payroll increase' rule should be sufficient to address any perceived integrity issues if the proposed adjustment to the baseline headcount is made.

Furthermore, as a safeguard to the rule, the reduction adjustment would only need to be counted in the actual period that the employee resigned, retired or died. Accordingly, this would provide the employer with time to find a suitable replacement to ensure that the headcount increase was restored by the end of the following JobMaker period.

We consider this solution to be simple and would provide additional integrity to the rules. It would also align with the purpose of the provisions, by ensuring that the business continues to employ persons in order to retain the JobMaker credit, and would not undermine business decisions due to actions outside of the control of the employer.

Option 2 — average

An alternative would be to modify the headcount calculation in section 29 (for the purposes of paragraph 26(1)(d)) so that it is calculated based on average full time employees for the relevant period, rather than being based on the number of employees at the end of the period. This would also be used for the purposes of section 32(5). We consider that this could be achieved by looking at the number of days worked by employees on a pro-rata basis for the period.

While this option would likely provide a more accurate reflection of the number of employees and the headcount increase amount for the period, it is more complicated than Option 1 and relies on the ATO being able to verify the accuracy of numbers used. For this reason, the Joint Bodies favour Option 1. That being said, if Treasury is interested in the mechanics of Option 2, we would be pleased to provide further details.

2. Technical clarifications

The table below recommends a number of technical corrections to the Exposure Draft, for consideration.

Item	Reference	Description of issue	Recommendation	Priority
1.	Paragraph 28(1)(d)	The current drafting of the provision precludes an individual from being an 'eligible additional employee' where they commenced employment with the entity more than 12 months before the start of the period. This rule would appear to inadvertently apply to employees who were terminated before 6 October 2020 due to COVID-19, but have sought re-employment opportunities with their former employer. If this rule remains in place, the employer would be forced to hire a new employee to comply with eligible employee requirements, rather than re-hiring the former employee. It could also inadvertently apply if an employee worked for the employer, for example 5 years earlier for a 2-year period, and was terminated; but then was subsequently re-employed within 12 months of the start of the period. The condition does not clearly state that the 12-month rule applies to the current employment arrangement.	This condition has been included to ensure that a person only remains an eligible employee for a maximum period of 12 months. This test should be redrafted to ensure that it does not have unintended outcomes by excluding earlier and separate periods of employment. The condition should be confined to the current employment arrangements and exclude prior periods of employment with the employer. The integrity of the system is maintained through section 19, which aims to prevent artificial and contrived arrangements which could arise in shorter periods.	High

Item	Reference	Description of issue	Recommendation	Priority
2.	Section 32 & paragraph 28(1)(d)	The current calculation of the 'headcount amount' for a period and the meaning of 'eligible additional employee' results in an employer having access to JobMaker for more than four full JobMaker periods. This is because an individual may be an 'eligible additional employee' for the period in which they commenced employment and the next four JobMaker periods. For example, an employee hired on 10 October 2020 can be an 'eligible additional employee' in the fifth JobMaker period (being, 7 October 2021 to 6 January 2022) because they commenced employment less than 12 months before the start of that period (i.e. 10 October 2020 is less than 12 months before 7 October 2021).	The Explanatory Material should make it clear whether JobMaker is intended to be available for 12 full months **in addition to** the part period during which the employee commenced employment (i.e. four full JobMaker periods and one part JobMaker period), such that the maximum credit available may, in fact, exceed $10,400 per employee (or $5,200 in the case of a lower rate employee).	High
3.	Paragraph 28(1)(e)	The 20-hour test is drafted such that it requires the employer to test hours worked only in each whole week that the individual is employed by the entity during the JobMaker period. JobMaker periods may have 90, 91 or 92 days. Where there are 92 days, this could mean 13 whole weeks and 1 day. For a JobMaker period with 90 days, this could mean 12 whole weeks and 6 days. In such case, it would seem unusual to disregard the hours worked in the last 6 days of the JobMaker period. There may have been a significant number of hours worked in that 6-day period (e.g. up to 60 hours).	The 20-hour test should be refined by taking the number of hours worked in the period, multiplying by 7 and dividing by the number of days employed to work out the average hours per 7 days (e.g. (275 hours × 7)/92 = 20.92 average hours).	Medium

Item	Reference	Description of issue	Recommendation	Priority
4.	Subsection 29(2)	The baseline headcount amount cannot be nil. The Explanatory Material suggests that this is to prevent sole traders from hiring themselves.	This should be adjusted such that the baseline headcount amount can be nil. A sole trader cannot employ him/herself at general law. If a sole director company or a trust controlled by an individual chooses to hire that individual, the contrived scheme rule can apply to deny access to the credit. Further, the 'related party' exclusions in subsection 28(7) would prevent that employee from being an 'eligible additional employee'. There is a large number of businesses with no employees who may seek to genuinely hire a staff member if support is available in the form of JobMaker. This rule to prevent 'sole traders from employing themselves' will result in many businesses unfairly missing out, as it aims to address a perceived integrity risk for which other mitigations already exist.	High
5.	Subsection 28(3)	The wording of the pre-employment requirement strictly requires that the individual was receiving one of the three relevant payments 'for at least 28 consecutive days…' meaning that a payment was received on each of those 28+ days.	We consider this should be reworded (e.g. the individual was **entitled** to receive the relevant payment during the relevant period).	Low

Item	Reference	Description of issue	Recommendation	Priority
6.	Subsection 28(3)	The requirement to have received JobSeeker payments for 28 days may result in a disincentive to seek employment by (or for employers to employ) those who have just commenced on the JobSeeker program. Given that the JobSeeker program has been extended to 31 March 2021, we consider this requirement is counterproductive. It may also 'force' a person who may otherwise not wish to accept welfare payments to take those payments.	To the extent that an employee has genuinely obtained JobSeeker payments, we do not consider the 28-day requirement is necessary.	Medium
7.	Subsection 28(3)	Given that the JobSeeker regime is due to end on 31 March 2021, clarification is required to ensure that the regime contained in the *Social Security Act 1991* (previously the Newstart Allowance) will continue to be named 'JobSeeker' so that subsection 28(3) can continue to operate after this date.	Clarification on the continuation of the JobSeeker regime for the purposes of subsection 28(3). Alternatively, we suggest the following words be added to the end of paragraph 28(3)(c): 'JobSeeker payment (or any successive name of this program).'	Low
8.	Paragraph 28(7)(b)	We are not clear on the rationale for this exclusion. An employer may wish to hire a previous contractor, due to his/her knowledge and understanding of the business. The contractor may have been legitimately receiving JobSeeker payments during the COVID-19 period. An employer may be better off hiring a 'known' previous contractor than someone who is unfamiliar with the business.	We consider that section 19 satisfactorily deals with arrangements to obtain a payment and that this additional integrity rule (in paragraph 28(7)(b)) is unnecessary.	Low

Item	Reference	Description of issue	Recommendation	Priority
9.	Paragraph 27(1)(c)	The wording of the requirement regarding lodgments being up-to-date is based on the entity being 'required' to lodge. Strictly speaking, the requirement to lodge may exist as soon as the Commissioner gives the annual notice of the requirement to lodge by way of legislative instrument.	We consider the drafting 'required to lodge' should be reworded as follows: '… the entity has lodged all of the income tax returns and GST returns where the due date for lodgment under a taxation law is within the two-year period ending at the JobMaker claim time.'	Low
10.	Paragraphs 27(2)(c)-(d)	The wording of the exclusion for entities for which a liquidator or trustee-in-bankruptcy has been appointed is such that the exclusion applies if such an appointment had been made 'at or before the end of the period'. Technically this could mean that an individual who was bankrupt in 1990 would be excluded as the trustee in bankruptcy was appointed on or before 6 January 2021.	We consider this should be reworded (e.g. there is a liquidator/bankruptcy trustee appointed at any time during the period).	Low
11.	Various	Typos in the Explanatory Material: ■ Page 3, last paragraph: '… in order benefit from …' ■ Page 6, last subheading: '… lodgement …' ■ Page 7, last paragraph: '… be qualifying a qualifying entity.' ■ Page 8, second last paragraph: 'The requirement that an employer commenced employment …' ■ Page 9, continuation of sentence at first paragraph: '… the individual was receiving the following payments…'	 Change to: '… in order to benefit from …' Should be spelt: 'lodgment' Change to: '… be a qualifying entity.' Change to: 'The requirement that an employee commenced employment …' Change to: '… the individual was receiving at least one of the following payments…'	Low

3. Post-implementation review

The Joint Bodies recommend that a post-implementation review be undertaken around six months after the JobMaker program has come into effect. Such a review will provide an opportunity to reflect on the impact and effectiveness of the program. It should involve public disclosure of the number of people hired as a result of this program. Such a review would be similar to Treasury's three-month review of the JobKeeper payment.

4. Other matters

Consolidated groups

We note that the Exposure Draft is silent on the interaction of the tax consolidation rules with JobMaker. In particular, whether a tax consolidated group with multiple employers can claim JobMaker for each entity and the application of the condition in paragraph 26(1)(h) (i.e. where an employer is entitled to JobKeeper payments).

For the purpose of applying paragraph 26(1)(h), we note that an entity within a relevant tax consolidated group should only be ineligible to receive JobMaker during a period in which they were receiving JobKeeper payments or were a 'test member' under paragraph 8A(2)(a) of the JobKeeper rules, where an employer entity in the group was in receipt of JobKeeper payments during that period on the basis of having satisfied the decline in turnover test under section 8A.

Where the members of the tax consolidated group were not otherwise relying on section 8A, there should be no exclusion based on any other group members receiving JobKeeper. Any artificial hiring done in one legal entity, with the work being performed for another entity in the group, may be dealt with under the contrived schemes rule.

When is the 'carrying on a business' etc. requirement tested?

We note that paragraph 27(1)(a) requires an employer to test either of the three conditions in (i) to (iii) after the day the entity notifies the Commissioner that it elects to participate in the JobMaker scheme. This requirement is also contained in paragraph 27(1)(b) with respect to an ABN and PAYG withholding registration. Both tests also require an employer to satisfy those conditions during 'so much of the relevant period as occurs after the day the entity notifies the Commissioner'. This is to be read in conjunction with paragraph 26(1)(f), which requires the notification to be made before the end of the relevant period.

For the first period, we consider that this may give rise to a number of technical complications if an extension of time is granted pursuant to the *Taxation Administration Act 1953* (see Note 3 to subsection 26(1)). That is, if the notification for the first period were to occur on or after 7 January 2021 (which we anticipate will be the case for a large number of entities in the first JobMaker period), an entity would not be able to satisfy these conditions as there would be no time during the first JobMaker period in which the conditions were satisfied.

To the extent that deferrals of time are granted by the Commissioner for any other periods, then the same issue may arise. Accordingly, if an extension is granted by the Commissioner in any period, it should be sufficient that these conditions are otherwise satisfied on the notification date by the relevant entity for that period.

Restructure

We would like to highlight that the current rules may act as an impediment to restructuring, as the entity may lose the JobMaker benefits if an employee is moved around within a group. We note that an exception was included in the JobKeeper rules under subsection 9(6) where restructures occurred within the same wholly owned group. We consider that a similar rule should also be included within the JobMaker provisions.

Section 19 guidance

The Joint Bodies consider that it would be helpful for guidance to be published on the scope and operation of section 19. We note that the ATO published PCG 2020/4 which considered JobKeeper schemes and this was considered helpful in that context.

If you would like to discuss any of the above, please contact Tax Counsel, Julie Abdalla, on (02) 8223 0058 in the first instance.

Yours faithfully,

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